Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. § 160(c) From	)	WC Docket No. 04-405
Application of *Computer Inquiry* and Title II	)	
Common-Carriage Requirements.	)	

PETITION FOR FORBEARANCE

BELLSOUTH TELECOMMUNICATIONS, INC.

By its Attorneys:

Bennett L. Ross
L. Barbee Ponder IV

Suite 900
1133 21st Street, N.W.
Washington, D.C. 20036-3351

(202) 463-4113

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PETITION FOR FORBEARANCE

Pursuant to 47 U.S.C. § 160(c), BellSouth respectfully requests that the Commission exercise its statutory authority – indeed, its obligation – to forbear from applying *Computer Inquiry*[1] requirements to the extent they require ILECs to tariff and offer the transport component of their broadband services[2] on a stand-alone basis and to take service itself under those same terms and conditions (as well as related Part 64 accounting requirements discussed below). BellSouth further requests that the Commission forbear from all Title II common-carriage requirements that might otherwise apply to ILEC broadband transmission so that BellSouth and other wireline competitors can respond in a timely fashion to the market by providing both wholesale and retail customers with the specific products that they desire.

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[1] *See* Final Decision and Order, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities (Computer I)*, 28 F.C.C.2d 267 (1971); Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 F.C.C.2d 384 (1980) ("*Computer II*"); Report and Order, *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements*, 14 FCC Rcd 4289 (1999) (collectively the "*Computer Inquiry*").

[2] For purposes of this petition, BellSouth uses "broadband" to refer to technologies that are capable of providing 200 Kbps in both directions. These services include high-speed Internet access provided using DSL technology.

I. SUMMARY

As the Commission itself has acknowledged, the *Computer Inquiry* requirements are vestiges of a time when "very different legal, technological, and market circumstances presented themselves."[3] The "core assumption underlying the *Computer Inquiries* was that the telephone network is the primary, if not exclusive, means through which information service providers can obtain access to customers."[4] Indeed, *Computer II* itself stressed that it was premised on the belief that the nationwide "telecommunications network" was the exclusive "building block" needed "to perform . . . information processing, data processing, process control, and other enhanced services."[5]

That fundamental premise is invalid in today's broadband market. The Commission's own statistics demonstrate that wireline networks are *not* the exclusive, or even the primary, means by which consumers obtain broadband access to the Internet and other information services. On the contrary, a *majority* of consumers receive broadband service from sources other than wireline providers. According to a Commission report issued just this June, more than 63 percent of residential and small-business customers receiving 200 kbps in one direction subscribe to cable modem, as opposed to just 34 percent that rely on wireline DSL.[6] Of customers that

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[3] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements*, 17 FCC Rcd 3019, 3037, ¶ 35, (2002) ("*Wireline Broadband NPRM*").

[4] *Id.* at 3037, ¶ 36.

[5] *Computer II*, 77 F.C.C.2d at 420, ¶ 96.

[6] *See* Report, *High-Speed Services for Internet Access: Status as of December 31, 2003*, Table 3, Chart 6 (FCC Wireline Competition Bureau June 2004) ("*High-Speed Services Report*"), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0604.pdf.

receive more than 200 kbps in both directions, 85 percent use cable modem, while only 13 percent use wireline DSL.[7]

Moreover, as discussed further below, cable modem is not the only alternative platform. Rather, broadband service can be, and increasingly is being, provided over wireless, satellite, and power-line platforms. In sum, as the Commission rightly explained several years ago, "the one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services."[8]

Because the market for broadband transmission is so competitive, the Commission has expressly concluded that neither *Computer Inquiry* network-sharing requirements nor common-carriage obligations should apply to market-leading cable modem providers. The Commission held that it "would be *inconsistent* with the public interest" and "disserve the goal of Section 706" to require cable modem providers to comply with this *Computer Inquiry* requirement, and thus that it would affirmatively waive those obligations even if they applied to cable providers.[9] The Commission thus flatly refused to mandate what it aptly termed the "radical surgery" required by the *Computer Inquiry* rules to the market leaders in broadband services.

The Commission likewise noted that cable companies were engaging in negotiated private-carriage arrangements with ISPs, and it did not require them to transform those offerings

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[7] *See id.*, Table 4, Chart 8.

[8] Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, 22747-48, ¶ 5 (2001).

[9] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities; Internet over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, 17 FCC Rcd 4798, 4826, ¶ 47 (2002) ("*Cable Modem Declaratory Ruling*") (emphasis added).

into common-carriage services subject to Title II.[10] Moreover, the Commission tentatively concluded that, even if Title II applied to cable modem services, it would exercise its forbearance authority as to *all* Title II obligations. The Commission justified that result by explaining that "cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing."[11]

The bottom line, accordingly, is that today the market leaders are not burdened with either *Computer Inquiry* or Title II obligations. Both law and sound policy require the Commission to, at long last, put wireline providers on the same footing. If it is unnecessary to impose *Computer Inquiry* or Title II obligations on the majority providers of broadband service to ensure just, reasonable, and nondiscriminatory rates and practices, it cannot possibly be the case that it is necessary to impose such obligations upon minority providers. The Commission is committed to adopting a "rational framework for the regulation of competing services that are provided via different technologies and network architectures"[12] and to guaranteeing that all "broadband services . . . exist in a minimal regulatory environment" that will "promote[] investment and innovation in a competitive market."[13] In conflict with those established regulatory goals, however, wireline providers remain subject to the very obligations that the Commission has concluded are not only unnecessary, but also contrary to the public interest in the case of the market leaders. Wireline providers, moreover, are saddled with these requirements despite the fact that this Commission has long had these issues before it in its

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[10] *See id.* at 4830-31, ¶ 55.

[11] *Id.* at 4847-48, ¶ 95.

[12] *Id.* at 4802, ¶ 6.

[13] *Id.* at 4802, ¶ 5 (internal quotation marks omitted).

Wireline Broadband NPRM, and even though the courts have recognized that like services should be treated alike.

The current upside-down state of affairs is not only grossly inequitable; it is also causing continuing consumer harm. BellSouth estimated that it spent $3.50 per customer per month in 2003 to comply with the *Computer Inquiry* requirements for broadband consumers. This amount represented costs that were directly attributable to compliance with *Computer Inquiry* obligations. Those expenses translate directly into higher costs for consumers. And those higher costs affect not only consumers of wireline services who are paying more than they should for these services, but also consumers of other competing services, who would benefit from greater pricing competition from wireline providers if they did not have to absorb these costs. Moreover, BellSouth's and other ILECs' incentives to invest in new technologies are dampened by the need to spend substantial amounts of money to configure those facilities so that they can support stand-alone transmission services offered on a common-carrier basis even if there is no market for that stand-alone tariffed service. Thus, as discussed in the attached Fogle Affidavit, BellSouth thus must incur costs to engineer its network to support products that consumers may not want.

The Commission's failure to act promptly on these matters after raising them in the *Wireline Broadband NPRM* – which was issued more than two-and-a-half years ago – may relate to the Ninth Circuit's decision in *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *petitions for cert. pending*, No. 04-281 (U.S. filed Aug. 27, 2004). But *Brand X* explicitly *declined* to address the *Computer Inquiry* requirements.[14] Likewise, even if the Supreme Court denies the Commission's petition for certiorari or affirms the Ninth Circuit in that case, that still

[14] *See Brand X*, 345 F.3d at 1132 n.14 (declining to consider issues under the *Computer Inquiry* or regarding private carriage).

would not affect this Commission's ability to forbear from imposing Title II obligations, as the Commission has already tentatively concluded it should do for cable modem providers. Accordingly, there is no barrier to this Commission acting now to provide the relief that has long been warranted for wireline broadband providers.

Nor can there be any dispute that the criteria for forbearance are satisfied here. Neither the *Computer Inquiry* requirements nor Title II common-carriage obligations are necessary to ensure just, reasonable, and nondiscriminatory rates and terms of service for ILEC broadband service because the competitive broadband market already serves that purpose. And, as discussed above, far from protecting consumers or being necessary to serve the public interest, the current rules harm consumers by imposing unnecessary costs and inhibiting broadband innovation and deployment. For these reasons and others discussed below, the Commission should promptly grant the long-overdue relief for wireline providers requested by this petition.

II. BACKGROUND

A. The *Computer Inquiry* Service Unbundling Requirements

Although the Commission decided in *Computer II* that enhanced services (referred to as "information services" under the 1996 Act) should remain free from common-carrier regulation, it also imposed a series of obligations on the wireline common carriers that own transmission facilities and offer enhanced services. Of particular relevance here, the Commission held that those carriers must make that underlying transmission available on a stand-alone basis pursuant to a tariff and acquire such transmission for their own enhanced services offerings under that same tariff. As the Commission explained in *Computer II*:

> [b]ecause enhanced services are dependent upon the common carrier offering of basic services, a basic service is the building block upon which enhanced services are offered. Thus those carriers that own common carrier transmission facilities and provide enhanced services, but are not

> subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized.[15]

As the Commission explained in 2002, "BOCs that provide information services are required to offer the transmission component of the information service separately pursuant to tariff, and must also acquire such transmission for their own information service offerings pursuant to their tariff."[16]

B. The Development of the Broadband Market

At the time of the *Computer II* (and even the *Computer III*) orders, there was nothing resembling today's broadband market. Rather, the *Computer Inquiry* orders were premised on the use of a wireline network that was "optimized primarily to carry voice traffic and narrowband data applications, such as voicemail."[17] The capabilities of broadband networks "were scarcely considered when the *Computer Inquiry* was begun."[18]

Moreover, and more important for present purposes, the *Computer Inquiry* orders were grounded not only in the assumption of a narrowband world, but also in a narrowband world in which a telephone line was the sole mechanism for transmitting information services. "[T]he *core assumption* underlying the *Computer Inquiries* was that the telephone network is the

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[15] *Computer II*, 77 F.C.C.2d. at 474-75, ¶ 231.

[16] *Wireline Broadband NPRM*, 17 FCC Rcd at 3040, ¶ 42; *see also* Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030-31, ¶ 37 (1998) (noting "that BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services").

[17] *Wireline Broadband NPRM*, 17 FCC Rcd at 3037, ¶ 36.

[18] *Id.*

primary, if not exclusive, means through which information service providers can obtain access to customers."[19]

As broadband has developed, it has become clear that wireline alternatives are not the exclusive or even the primary broadband transmission mechanism for information service providers to reach their customers. On the contrary, as broadband has grown, cable providers have consistently served more customers than have wireline providers in accessing the Internet. According to the Commission's data, at the end of 1999, there were approximately 1.8 million high-speed lines used to serve residential and small-business customers.[20] Of those 1.8 million lines, 1.4 million lines were served by cable operators, while just 292,000 lines were served by ADSL providers.[21]

Recent data from this Commission show that cable continues to dominate the market. According to the latest *High-Speed Services Report*, as of December 2003, cable controlled nearly *two-thirds* of all high-speed lines provided to residential and small-business customers.[22] As of the end of 2003, cable providers served 16.4 million lines to residential and small-business customers, while ADSL providers served 8.9 million lines, and satellite and wireless providers served 342,000 lines.[23] As of that same date, cable also controlled approximately *85 percent* of

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[19] *Id.*

[20] *See High-Speed Services Report*, Table 3.

[21] *See id.* Another 48,000 lines were served by other wireline technologies or fiber. *See id.*

[22] *See id.*

[23] *See id.*, Table 3, Chart 6. Another 310,000 lines were served by other wireline technologies or fiber. *See id.*

the most rapidly growing segment of mass-market advanced services lines – those capable of over 200 kbps in both directions.[24]

Even more current information demonstrates that cable has continued to maintain its lead over DSL through the second quarter of 2004, despite significant price decreases by DSL providers.[25] In the first half of 2004, both cable and DSL each added 2 million new subscribers, ending the month of June with 16.9 million and 11.3 million subscribers, respectively.[26]

Cable also continues to lead DSL in terms of availability and penetration. Cable modem service is now available to more than 85 percent of all U.S. households,[27] and, by the end of 2004, will be available to 90 percent of U.S. households.[28] Four of the largest cable companies (Comcast, Time Warner, Cox, and Cablevision) now make cable modem service available to between 95 and 100 percent of their homes passed,[29] and between 25 and 36 percent of these

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[24] *See id.*, Table 4, Chart 8. Residential and small-business high-speed lines capable of over 200 kbps in both directions represented 89 percent of all residential and small-business high-speed lines added in 2003, and 92 percent of all high-speed lines capable of over 200 kbps in one direction added during that same period. *See id.*, Tables 1-4.

[25] *See, e.g.*, John Hodulik & Aryeh Bourkoff, UBS, *High-Speed Data Update for 1Q04: DSL Net Adds Greater Than Cable for First Time Ever* at 1 (May 21, 2004) ("Cable continues to control the market for broadband with 60% share."); Glen Campbell *et al.*, Merrill Lynch In-depth Report, *Everything over IP* at 2 (Mar. 12, 2004) ("Thanks to price-cutting, DSL made modest inroads into cable's dominant position in the U.S. market."), *available at* http://www.vonage.com/media/pdf/res_03_12_04.pdf.

[26] *See* Michael Rollins *et al.*, Citigroup, *Telecom Tidbit: Updating HSI Share Analysis for Recent 2Q Results* at 4 (Aug. 16, 2004).

[27] *See* National Cable & Telecommunications Association, *Broadband Services* (Sept. 23, 2004), *available at* http://www.ncta.com/Docs/PageContent.cfm?pageID=37; *see also* Jeffrey Halpern *et al.*, Bernstein Research Call, *Broadband Update: DSL Share Reaches 40% of Net Adds in 4Q . . . Overall Growth Remains Robust* at 1 & Exh. 6 (Mar. 10, 2004) ("*Mar. 2004 Bernstein Broadband Update*") (cable broadband available to 92.3 percent of total cable homes passed).

[28] *See Mar. 2004 Bernstein Broadband Update* at 7.

[29] *See, e.g.*, *id.* at 7 & Exh. 6 (reporting cable modem availability at 98.5 percent for Time Warner, 97.7 percent for Cox, 100 percent for Cablevision, and 87.3 percent for Comcast, which is adding almost 3.5 million homes passed in 2004).

companies' video subscribers now receive cable modem service.[30] The Bell operating companies, by contrast, currently make DSL available to about 75-80 percent of their homes passed,[31] and only between 9 and 17 percent of their residential voice subscribers take DSL.[32]

Cable modem service is available in virtually all of the same markets where DSL is provided. JP Morgan has estimated that no more than 5 percent of U.S. households would be able to receive DSL but not cable modem by the end of 2003.[33] The actual number may well be even lower today, given that JP Morgan assumed that cable modem service would be available to only 76 percent of all U.S. households as of year-end 2003, whereas the actual total today is somewhere between 85 and 90 percent.[34]

Finally, as the Commission itself stressed in July 2004, "[b]roadband Internet access services are rapidly being developed or provided over technologies *other* than wireline and cable, such as wireless and powerline."[35] For instance, the Commission has estimated that residential fixed wireless Internet access is available in counties that contain approximately 62 million

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[30] *See* Aryeh Bourkoff & John Hodulik, UBS, *High-Speed Data Update for 4Q03: Getting Ready for Cable Telephony* at 8, Chart 6 (Mar. 11, 2004).

[31] *See Mar. 2004 Bernstein Broadband Update* at 7 & Exh. 7 (reporting DSL availability at 75 percent for SBC, 80 percent for Verizon, 74 percent for BellSouth, and 45 percent for Qwest).

[32] Hodulik *et al.*, UBS, *High-Speed Data Update for 1Q04* at Chart 4.

[33] *See* Jason Bazinet *et al.*, JP Morgan, *Broadband 2003: Deflation Looms and Market Shares Will Shift*, Fig. 9 (Dec. 5, 2002).

[34] *See id.*

[35] Notice of Proposed Rulemaking and Declaratory Ruling, *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 19 FCC Rcd 15676, ¶ 37 n.82 (2004) (emphasis added); *see also* Kathleen Q. Abernathy, Commissioner, FCC, *Promoting the Broadband Future*, Keynote Address at Supercomm Conference at 2-3 (June 22, 2004) ("As a result of the consumer benefits and efficiencies, wireline telecommunications carriers, cable operators, wireless carriers, satellite operators, electric utilities, and others are racing to build out broadband networks."), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248688A1.pdf.

people, or 22 percent of the U.S. population.[36] The national trade association for fixed wireless providers has stated that "approximately 1,500-1,800 [Wireless ISPs] already are providing service to approximately 600,000 subscribers in the U.S., with subscribership expected to double by the end of 2003 and reach nearly 2,000,000 by the end of 2004."[37] As the chairman of that association has noted, "[w]ireless ISPs have rolled out broadband service in virtually every state of the union – and in hundreds of rural and metropolitan markets. . . . Wireless has boldly become the nation's third pipe for last-mile access."[38]

Satellite is another alternative that has begun a resurgence. As one industry observer has noted, "satellite broadband will be on the upswing again in 2004."[39] One of the two main broadband satellite providers – Hughes Network Systems – reported 180,000 customers for its

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[36] *See* Eighth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 18 FCC Rcd 14783, App. A, 14882 n.709 (2003).

[37] Comments of the License-Exempt Alliance at 3, *Revision of Parts 2 and 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band*, ET Docket No. 03-122 (FCC filed Sept. 3, 2003), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514784221 (citing Alvarion, Inc., *The License-Exempt Wireless Broadband Market* at 8 (Apr. 2003)). The Commission's own *High-Speed Services Report* counts only 309,006 high-speed lines provided through satellite or fixed wireless as of June 2003, but this is likely due to the fact that many fixed wireless lines are provided in rural areas by small providers. As the Commission notes, "we do not know how comprehensively small providers, many of which serve rural areas with relatively small populations, are represented in the data summarized here." *High-Speed Services Report* at 2.

[38] *WISPs Buck Investment Trends*, ISP-Planet (Nov. 12, 2002) (internal quotation marks omitted), *available at* http://www.isp-planet.com/research/2002/vc_trends_021112.html.

[39] Roger Brown & Jeff Baumgartner, *Smooth Sailing or the Perfect Storm?*, CED (Jan. 1, 2004), *available at* http://www.cedmagazine.com/ced/2004/0104/id1.htm; *see also ISCe Panelists See Big Satellite Broadband Growth Potential*, Satellite Week (Aug. 25, 2003) ("Michael Agnostelli, SES Americom vp-business strategy, said that for the first time DBS TV services cost less . . . than cable TV. 'There's no reason satellite broadband can't cost less than [DSL or cable modem],' he said: 'The technology is well positioned to hit the cost point and performance point that consumers are looking for.'").

DIRECWAY service as of year-end 2003.[40] In October 2003, MCI began reselling Hughes's DIRECWAY service to small-to-medium businesses and enterprises.[41] MCI has thus explained that, "[w]ith today's broadband satellite technology . . . you can connect remote employees and offices wirelessly while experiencing the same advantages that many terrestrial options offer, such as speed, security and reasonable costs."[42] The other main satellite provider – StarBand – emerged from bankruptcy in November 2003 with most of its customer base intact.[43] The company has introduced new hardware and service offerings targeted at mass-market customers that offer lower prices and higher speeds than were previously available.[44]

Additionally, as the Commission has noted, power lines have enormous broadband potential: "[W]e believe that these new systems, known as Access broadband over power line or Access BPL, could play an important role in providing additional competition in the offering of broadband services to the American home and consumers, and in bringing Internet and high-

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[40] *See* DirecTV Group Inc., Form 10-K (SEC filed Mar. 17, 2004) (residential and small office/home-office customers in North America), *available at* http://www.sec.gov/Archives/edgar/data/944868/000119312504044194/0001193125-04-044194-index.htm.

[41] *See* MCI, *Enterprise: Internet Broadband Satellite Corporate*, *available at* http://global.mci.com/us/enterprise/internet/broadbandsat/.

[42] *Id.*

[43] *See Starband To Emerge from Bankruptcy Protection by Month's End*, Satellite Week (Nov. 24, 2003) ("Starband is expected to emerge from bankruptcy protection late this month with a revamped sales staff. . . . Starband has 38,000 subscribers, having lost 2,000 since filing for bankruptcy protection in U.S. Dist. Court, Wilmington, Del., in May 2002.").

[44] *See, e.g.*, StarBand Press Release, *StarBand Launches New 481 Residential Service* (July 15, 2004) (StarBand's 481 Residential service "provides . . . the satellite industry leading upload speeds at an affordable monthly fee ranging from $69.99 to $89.99 per month based on term commitment length"), *available at* http://www.starband.com/whatis/pressreleases/071504.asp; StarBand Press Release, *The Satellite Internet Industry's Fastest SOHO Upload Speed – Up to 256 Kbps* (Aug. 19, 2004) (StarBand's new 484 Small Office service provides download speeds of up to 1 Mbps, with upload speeds up to 256 kbps), *available at* http://www.starband.com/whatis/pressreleases/081904.asp.

speed broadband access to rural and underserved areas."[45] The Commission recently adopted rules to encourage the development of broadband over power lines, while safeguarding existing licensed services against interference.[46]

C. The Commission's Conclusion That Neither *Computer Inquiry* Network-Access Requirements Nor Title II Common-Carriage Duties Should Apply to Market-Leading Cable Providers

In March 2002, the Commission issued an order addressing the same issues presented here as applied to cable modem providers. After acknowledging that, "throughout the brief history of the residential broadband business, cable modem has been the most widely subscribed to technology," the Commission concluded that, as a matter of both law and sound policy, cable providers should not be subject either to *Computer Inquiry* network-access requirements or Title II common-carrier regulation.

The Commission first characterized the *Computer Inquiry* obligations at issue here as requiring "radical surgery."[47] Those orders, the Commission explained, require a provider to "extract" a telecommunications service from "every information service" and to subject that service to the common-carrier requirements of Title II.[48]

The Commission then concluded that not only did these *Computer Inquiry* requirements not apply to cable providers even if they offered local exchange services, but also – and more importantly for present purposes – that, even if they did apply, the Commission would waive

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[45] Notice of Proposed Rulemaking, *Carrier Current Systems, Including Broadband over Power Line Systems*, 19 FCC Rcd 3335, 3336, ¶ 1 (2004).

[46] See FCC News Release, *FCC Adopts Rules for Broadband over Power Lines To Increase Competition and Promote Broadband Service to All Americans* (FCC Oct. 14, 2004), *available at* http:wwhraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253125A1.pdf.

[47] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825, ¶ 43.

[48] *Id.*

them as "inconsistent with the public interest."[49] The Commission explained that imposing such a rule even on the providers of the *majority* of broadband services was not necessary and would discourage facilities-based competition in both voice telephony and high-speed services.[50] Such a result would "disserve the goal of Section 706 that we 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment.'"[51] In sum, application of the *Computer Inquiry* rules to cable companies would be "inconsistent with the public interest."[52]

The Commission also noted that a leading cable provider (Time Warner) had reached agreements with an independent ISP (Earthlink) to provide a retail cable modem service.[53] The Commission concluded that such an offering constituted private carriage because Time Warner was "determining on an individual basis whether to deal with particular ISPs and is in each case deciding the terms on which it will deal with any particular ISP."[54] The Commission took no steps to require Time Warner to offer this transmission subject to the common-carrier requirements of Title II and further concluded that, "to the extent that other cable providers elect to provide pure telecommunications to selected clients with whom they deal on an individualized basis, we would expect their offerings to be private carrier service."[55]

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[49] *Id.* at 4825-26, ¶ 45.

[50] *See id.* at 4826, ¶¶ 46-47.

[51] *Id.* at 4826, ¶ 47 (quoting 47 U.S.C. § 157).

[52] *Id.*

[53] *See id.* at 4828-29, ¶ 52.

[54] *Id.* at 4830, ¶ 55.

[55] *Id.*

Finally, the Commission tentatively held that, even if Title II did apply to these market leaders, it would exercise the same forbearance authority at issue here to excuse cable providers from these requirements. The Commission "tentatively conclude[d] that the public interest would be served by the uniform national policy that would result from the exercise of forbearance" from Title II.[56] "We also believe that forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing."[57] The Commission stated that those same factors led it to believe that "enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory."[58]

In *Brand X*, the Ninth Circuit reversed the Commission's determination that cable modem service consisted exclusively of an information service and had no telecommunications service component.[59] This decision has been stayed pending the Supreme Court's disposition of the petition for certiorari filed by the Commission and the United States.[60] Even aside from the stay, by its terms, the Ninth Circuit's decision did not affect the Commission's conclusion that the application of *Computer Inquiry* requirements would be contrary to the public interest,[61] nor did it affect the Commission's authority to forbear from applying Title II common-carrier regulations to any high-speed providers.

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[56] *Id.* at 4847-48, ¶ 95.

[57] *Id.*

[58] *Id.*

[59] *See* 345 F.3d at 1132.

[60] *See* Stay Order, *Brand X Internet Servs. v. FCC*, Nos. 02-70518 *et al.* (9th Cir. Apr. 9, 2004)

[61] *See id.* at 1132 n.14.

III. DISCUSSION

A. Section 10, Fortified Here By Section 706, Requires The Commission To Forbear When The Regulatory Rules Are Unnecessary And Impede Deployment

Congress specified that this Commission "*shall* forbear from applying any regulation or any provision of the Act" if three related criteria are met.[62] Those criteria are that (1) enforcement "is not necessary to ensure that the charges, practices, classifications, or regulations" are "just and reasonable and not unjustly and unreasonably discriminatory"; (2) enforcement is not "necessary for the protection of consumers"; and (3) forbearance is "consistent with the public interest."[63] Section 10 thus requires the Commission to "reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest."[64] In Chairman Powell's words, "[t]he statute makes clear (through *mandatory* section 10 forbearance [and other mechanisms]) that Congress has decided that markets should replace regulation except where actually necessary to protect consumers or to maintain just, reasonable and nondiscriminatory rates, terms and conditions."[65]

The Commission's obligation to forbear is all the more clear in this context, in light of the explicit congressional judgment reflected in section 706 of the 1996 Act. Section 706 establishes this Commission's duty to "remove barriers to infrastructure investment" in order to "promote" broadband competition. As the Commission has explained, section 706 "directs the Commission to use the authority granted in other provisions, including the forbearance authority

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[62] 47 U.S.C. § 160(a) (emphasis added).

[63] *Id.*

[64] 141 Cong. Rec. S7887 (daily ed. June 7, 1995).

[65] First Report and Order and Further Notice of Proposed Rulemaking, *Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492, 7566 (1999) (Separate Statement of Commissioner Michael K. Powell, concurring) (emphasis added).

under section 10(a), to encourage the deployment of advanced services."[66] Accordingly, just as the Commission relied upon section 706 in determining that it would not be appropriate to apply the same requirements at issue here to cable modem providers,[67] that provision fortifies the conclusion here that forbearance is required for the wireline ILECs that compete with those cable providers.

B. The Requirements For Forbearance Of The *Computer Inquiry* Tariffing And Service Unbundling Obligations Are Met

All three requirements for forbearance are easily satisfied as to the *Computer Inquiry*'s requirement that ILECs engage in the "radical surgery" necessary to offer the transmission component of every information service they provide as a tariffed, stand-alone telecommunications service offering and to buy that transmission under the terms and conditions of that tariff.

First, enforcement of these requirements is not necessary to ensure that rates are just and reasonable or that carriers do not engage in unjust or unreasonable discrimination. In this regard, the Commission, in granting previous forbearance petitions, has already established the key point. In language clear as sunlight, the Commission has stated that "competition is the most effective means of ensuring that the charges, practices, classifications, and regulations with respect to [a telecommunications service] are just and reasonable, and not unjustly or unreasonably discriminatory."[68]

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[66] Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd at 24044-45, ¶ 69.

[67] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4826, ¶ 47.

[68] Memorandum Opinion and Order, *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, 16270, ¶ 31 (1999) ("*Directory Assistance Order*").

That insight resolves this issue. There can be no dispute that vigorous intermodal competition exists in broadband service that is in no way dependent on the *Computer Inquiry* requirements. As demonstrated in detail above at pages 9-12, the Commission's own statistics demonstrate that cable modem has always been the market leader, and that it continues to have a significant majority of the customers. In addition to cable, other intermodal competitors (including those using wireless, satellite, and power line broadband platforms) are also either providing significant competitive alternatives or are poised to do so in the near future. In such a "competitive environment," "regulation is not needed to encourage competitive prices."[69]

Indeed, in a related context, the Commission relied heavily on the existence of competition in the *Triennial Review Order*[70] in declining to require unbundling of most broadband facilities.[71] As the Commission explained there, cable has a "leading position in the marketplace," is the "most widely used means by which the mass market obtains broadband service," and "continues to outpace" wireline broadband in terms of growth.[72] The existence of that competition made it unnecessary to require wireline providers to share their network facilities in order to spur competition. The D.C. Circuit affirmed the Commission's deregulatory conclusion on that point and particularly emphasized that it "agree[d]" that regulation was not necessary because "robust intermodal competition from cable providers – the existence of which

[69] Order and Notice of Proposed Rulemaking, *Comsat Corp. Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083, 14148, ¶ 131 (1998) ("*Comcast Order*").

[70] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") (subsequent history omitted).

[71] *See, e.g., id.* at 17151-52, ¶ 292 (highlighting the extent of intermodal competition and stressing that "broadband services are provided in a competitive marketplace").

[72] *Id.* at 17135-36, ¶ 262, 17151-52, ¶ 292.

is supported by very strong record evidence, including cable's maintenance of a broadband market share on the order of 60% – means that even if all CLECs were driven from the broadband market, *mass market consumers will still have the benefits of competition between cable providers and ILECs*."[73]

The empirical evidence, moreover, demonstrates that the existence of this significant intermodal competition has had precisely the effect that one would expect: it has ensured that consumers have had the benefits of rates that are just, reasonable, and not unreasonably discriminatory. As demonstrated in prior filings,[74] intermodal competition has led to a "price war[]" in which wireline competitors have reduced rates and cable companies have responded with promotional and targeted price reductions, and, more broadly, have increased data speeds that effectively offer consumers more bandwidth at a lower price than those operators' previous offerings.

Analysts expect all of these trends to continue, with the market becoming increasingly competitive and prices dropping even further.[75] Deutsche Bank, for example, expects the cable industry "to lower basic pricing very close to the $30 level in reasonably short order."[76] In sum, as the Commission recently concluded: "*[T]he competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer*

[73] *USTA II*, 359 F.3d at 582 (emphasis added).

[74] *See* *Competition in the Provision of Voice over IP and Other IP-Enabled Services* at App. A, Table 4, attached to Letter from Evan T. Leo, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to Marlene H. Dortch, FCC, WC Docket No. 04-36 (May 28, 2004); *UNE Fact Report 2004* at App. A, Table 4, attached to Letter from Evan T. Leo, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to Marlene H. Dortch, FCC, WC Docket Nos. 04-313, *et al.* (Oct. 4, 2004).

[75] *See, e.g.*, Richard Bilotti *et al.*, Morgan Stanley, *Broadband Update – Tiering Strategies* at 4 (Apr. 12, 2004) ("[O]ur forecasts assume that cable modem pricing declines from an average of $40 in 2003 to approximately $34-36 longer term.").

[76] Viktor Shvets *et al.*, Deutsche Bank Securities Inc., *Wireline Services; DSL – A Reversal of Fortune* at 4 (May 4, 2004).

increasingly faster service at the same or even lower retail prices."[77] For all these reasons, the Commission's conclusion that competition is better than regulation in assuring just, reasonable, and not unjustly discriminatory rates applies with great force to the present context.

Even beyond this evidence, moreover, the Commission's conclusion in the *Cable Modem Declaratory Ruling* that it would waive the *Computer Inquiry* requirements if they applied to cable modem providers necessarily leads to the conclusion that these same requirements are not necessary here to ensure just, reasonable, and not unjustly discriminatory rates and practices. If consumers do not need the majority providers to open their lines to independent ISPs in order to ensure just, reasonable, and nondiscriminatory rates and practices, it cannot possibly be the case that it is necessary that the minority providers open their lines to ensure the same thing.

Indeed, on this and the other questions posed here, the Commission has a legal obligation to reach the same deregulatory conclusion for wireline providers that it did for cable companies. When in the past the Commission has lost sight of the core principle that like services should be treated alike, the courts have intervened. For instance, when the Commission sought to regulate PCS services differently from cellular services, the Sixth Circuit reversed the Commission, explaining that "[i]f [PCS] and Cellular . . . are expected to compete for customers on price, quality, and services, . . . what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers?"[78] Because the Commission provided "no answer to this question, other than its raw assertion that the two industries are different," its decision could not be sustained.[79] Just so here, where cable modem services are

[77] *Fourth Advanced Service Report*, 2004 FCC LEXIS 5157, at *12.

[78] *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995).

[79] *Id.*; *see also GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 343-44 (6th Cir. 2000) (affirming Commission decision on remand from *Cincinnati Bell* to impose separate affiliate requirements on *all* local telephone companies providing *any* kind of commercial mobile radio service).

competing against wireline broadband services. In such a situation, both law and policy require that competing providers be subject to the same obligations regardless of the technologies they use.

Second, far from being necessary for the "protection of consumers," the *Computer Inquiry* rules affirmatively harm consumers by raising costs and impeding competition and investment.

BellSouth has previously demonstrated to the Commission that the *Computer Inquiry* costs that can be quantified and that are directly attributable to compliance with *Computer Inquiry* obligations amounted to approximately $48.3 million in 2003, which is about $45.28 of yearly cost per end-user customer utilizing BellSouth's broadband network.[80] These costs raise prices not only for consumers using wireline broadband, but also for cable modem customers by creating a pricing umbrella that diminishes competitive pressure on cable rates. The costs imposed by the *Computer Inquiry* requirements stem from both network design inefficiencies that BellSouth must endure to ensure compliance with those requirements and from additional infrastructure and operating costs imposed by them.[81]

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[80] *See* BellSouth Ex Parte, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, WC Docket No. 02-33 (FCC July 10, 2003), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514285333; Fogle Aff. ¶¶ 7-11.

[81] In the Cable Modem Declaratory Ruling, the FCC recognized the various types of costs caused by the "radical surgery" required by the *Computer Inquiry* regime:

> The multiple-ISP environment requires a re-thinking of many technical, operational, and financial issues, including implementation of routing techniques to accommodate multiple ISPs, Quality of Service, and the compensation, billing, and customer service arrangements between the cable operator and the ISPs. While much more could be said regarding these issues, it is clear that they center around the difficulties of trying to modify a service designed to be provisioned by a single cable modem service provider to allow the provisioning of cable modem service by multiple service providers.

To take just one example of these kinds of costs imposed by these requirements, BellSouth has created a Regional Broadband Aggregation Network ("RBAN") product. One ISP had expressed an interest in purchasing a more efficient broadband information service arrangement that included regional traffic aggregation and protocol conversion. Nevertheless, and despite the fact that no other company has expressed interest in obtaining the basic transmission underlying this RBAN offering, BellSouth was required by existing *Computer Inquiry* rules to make several changes to its tariff and its network systems to support the development and competitive position of such a pure transmission product.[82] The two-year delay in BellSouth's ability to develop RBAN was due in large part to these kinds of regulatory burdens.

Moreover, because of the *Computer Inquiry* requirements, all enhancements to RBAN have had to be accomplished in two stages. BellSouth must first make the underlying tariffed transmission functionality available to all ISPs and then develop the corresponding non-regulated enhanced service offering. Thus, in the past year, BellSouth has rolled out a number of enhancements aimed to meet the needs of its wholesale ISP customers. This two-stage process created considerable delay in developing new products. Specifically, even though BellSouth had tariffed its 256 kb DSL service in August 2003, it was only able to make available its RBAN

Cable Modem Declaratory Ruling, ¶ 29. Presently, BellSouth must engage in this series of "re-thinking" every time BellSouth considers offering a new broadband service or modifying an existing broadband service.

[82] BellSouth had to make repeated minor changes to its tariffs and technical publications in order to develop RBAN. Because these changes were made to services in a non-revocable tariff, BellSouth would be required to support the tariff changes even if the planned RBAN offering did not succeed in the marketplace. Forcing regulated portions of a new enhanced service offering to be tariffed along with all of the associated long-term costs reduces BellSouth's willingness to innovate and invest in future enhanced service offerings. In addition, these required tariff changes send signals to competitors that harm competition. *See, e.g., Comcast* Order, 13 FCC Rcd at 14118, ¶ 66.

service in May 2004 (a delay of more than six months). Due to increased competitive pressure by cable companies rolling out higher-speed cable modem services, and by utilizing the functionality gained with the development of the 256 kb service within RBAN, BellSouth was able to compress the timing gap between the tariffed availability of its 3 Mb DSL service and its availability in RBAN to just over three months. That delay harms consumers and serves no valid regulatory purpose; on the contrary, it simply has allowed the dominant broadband providers (cable companies) additional time to increase their lead over BellSouth.

Just as with the *Computer Inquiry* requirements, the related Part 64[83] rules pose significant regulatory burdens. If the Commission requires BellSouth to allocate costs pursuant to Part 64 for broadband information services, it would place BellSouth at very burdensome regulatory odds with other providers, including the dominant cable modem providers.

Part 64 was an outgrowth of the *Computer Inquiry* proceedings.[84] If a company elected to provide enhanced services through an integrated operation, as opposed to a separate affiliate, the Commission believed there was a potential risk that the ILEC could subsidize the non-regulated operations with the regulated operations. This risk, however, was identified at a time when ILECs were subject to rate-of-return (also referred to as cost-plus) regulation for customer rates.

To alleviate this problem, the Commission promulgated Part 64.900 cost allocation requirements. These rules essentially require ILECs to allocate costs between regulated operations and non-regulated operations on the basis of direct assignment when possible. All

[83] 47 C.F.R. § 64.900 *et seq.*

[84] Report and Order, *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities; Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and their Affiliates*, 2 FCC Rcd 1298 (1987) ("*Joint Cost Order*").